United Overseas Bank (M) Bhd v Loke Lai Ying

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS B-03-22 OF 1999 AND B-03-22 OF 1999
MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ JJCA
10 JUNE 2003

Bankruptcy *— Notice — Setting aside — Affidavit in opposition treated as application to set aside — Whether affidavit in opposition bad in law — Whether court could overlook procedural errors by invoking inherent powers — Bankruptcy Act 1967 s 91*

Lee Wah Bank Ltd obtained a single judgment against both the respondents with interest and costs. By a vesting order under s 50(1) of the Banking and Financial Institutions Act 1989, the assets, rights and remedies of Lee Wah Bank Ltd became vested in United Overseas Bank (M) Bhd, the appellants. On 30 September 1995, the appellants had a bankruptcy notice issued against the respondents demanding payment of the amount due. The bankruptcy notice, however, was never served on the respondents. The notice lapsed three months later. On 15 April 1996, the appellants filed another bankruptcy notice. The judgment notice stated the fact that all assets, rights and remedies of Lee Wah Bank Ltd had vested in the appellants by virtue of the vesting order. The bankruptcy notice was served on the respondents but a copy of the vesting order was not served with it. The respondents responded by filing an affidavit in which it was prayed that the bankruptcy notice be set aside. The deputy registrar, by virtue of r 95(1) of the Bankruptcy Rules 1969, treated the affidavit as operating as an application to set aside the bankruptcy notice, heard the application, and set aside the bankruptcy notice. The appellants' appeal to the judge in chambers was dismissed and they appealed to the Court of Appeal. The appellants' main ground of appeal was that the application for the setting aside of the bankruptcy notice, made as it was through the vehicle of that affidavit, was invalid as the form and manner of it was not permitted by the rules. The respondents conceded that on the authorities, the appellants were correct in their objection to the form and manner of the respondent's application, but had urged the court to overlook the procedural error by invoking what was conceived to be the inherent powers of the court under s 91(1) of the Bankruptcy Act 1967 ('the Act').

Held, allowing the appeal:

Section 91(1) of the Act gives full power to the court to decide all questions for the purpose of doing complete justice in bankruptcy cases. The emphasis of the section is on deciding all questions, whether of fact or law. It tells the judge that to do complete justice, he has full power to decide all questions and he should exercise the power if necessary. Do not leave any question undecided, if by not deciding it complete justice will not be done. Do not leave any stone unturned in the pursuit of complete justice. But it is not the intention of the section that if the

answer to a question is found to be in favor of the creditor, the debtor is yet to be saved on the perception that that would be doing complete justice. Complete justice is owed to both parties equally, not to one only. If in the interest of doing complete justice a question is decided, and decided in favour of a party, the consequence of the decision ought to be given effect to. Thus, in this case, since the question of law whether the mode adopted by the respondent to apply for the striking out of the bankruptcy notice was clearly to be decided in favour of the appellants, the consequence of the decision must be given effect to. It is not the intention of s 91(1) to give power to the court to decide further, in the name of doing complete justice, to overlook the fault or to validate it (see p 206B–F).

[Bahasa Malaysia summary

Lee Wah Bank Ltd telah memperoleh satu penghakiman terhadap kedua-dua responden-responden dengan faedah dan kos. Melalui satu perintah letakhak di bawah s 50(1) Akta Bank dan Institusi-Institusi Kewangan 1989, aset-aset, hak-hak dan remedi-remedi Lee Wah Bank Ltd terletak hak pada United Overseas Bank (M) Bhd, perayu-perayu. Pada 30 September 1995, perayu-perayu mendapat satu notis kebankrapan untuk dikeluarkan terhadap responden-responden menuntut pembayaran bagi jumlah yang perlu dibayar. Notis kebankrapan tersebut, bagaimanapun, tidak disampaikan ke atas responden-responden. Notis tersebut telah luput tiga bulan kemudian. Pada 15 April 1996, perayu-perayu telah memfailkan satu lagi notis kebankrapan. Notis penghakiman tersebut menyatakan fakta bahawa semua aset-aset, hak-hak dan remedi-remedi Lee Wah Bank Ltd terletak hak pada perayu-perayu menurut perintah letakhak tersebut. Notis kebankrapan tersebut telah disampaikan ke atas responden-responden tetapi salinan perintah letakhak tersebut tidak disampaikan bersamanya. Responden-responden telah membalas dengan memfailkan satu afidavit di mana ia memohon agar notis kebankrapan tersebut diketepikan. Timbalan pendaftar, menurut k 95(1) Kaedah-Kaedah Kebankrapan 1969, menganggap afidavit tersebut sebagai bertindak untuk mengenepikan permohonan tersebut, dan telah mengenepikan notis kebankrapan tersebut. Rayuan perayu-perayu kepada hakim dalam kamar telah ditolak dan mereka telah merayu ke Mahkamah Rayuan. Alasan utama rayuan perayu-perayu adalah bahawa permohonan untuk mengenepikan notis kebankrapan, yang dibuat melalui afidavit, adalah tidak sah kerana bentuk dan sifatnya tidak dibenarkan oleh kaedah-kaedah. Responden-responden mengaku bahawa berdasarkan autoriti-autoriti, perayu-perayu adalah betul dalam bantahan mereka berhubung bentuk dan sifat permohonan responden-responden tersebut, tetapi memohon mahkamah untuk tidak mengendahkan kesilapan prosedur tersebut dengan menggunakan apa yang difikirkan adalah kuasa-kuasa sedia ada mahkamah di bawah s 91(1) Akta Kebankrapan 1967 ('Akta tersebut').

A **Diputuskan**, membenarkan rayuan tersebut:

Seksyen 91(1) Akta tersebut memberikan kuasa penuh kepada mahkamah untuk memutuskan kesemua persoalan-persoalan bagi tujuan melakukan keadilan dalam kes-kes kebankrapan. Penekanan seksyen tersebut adalah membuat keputusan semua persoalan-
B persoalan, sama ada fakta atau undang-undang. Ia memberitahu hakim bahawa untuk berlaku adil, beliau mempunyai kuasa penuh untuk memutuskan kesemua persoalan-persoalan dan beliau hendaklah menggunakan kuasa tersebut jika perlu. Jangan membiarkan apa-apa persoalan tanpa suatu keputusan, jika dengan
C tidak membuat keputusan, keadilan menyeluruh tidak akan terlaksana. Jangan membiarkan apa-apa persoalan tidak dibicarakan demi keadilan menyeluruh. Namun ia bukan niat seksyen tersebut jika jawapan suatu persoalan didapati menyebelahi pemiutang, penghutang masih boleh diselamatkan lagi dengan persepsi bahawa dengan berbuat demikian keadilan menyeluruh akan terlaksana.
D Keadilan menyeluruh adalah hak bersama kedua-dua pihak, bukan hanya satu. Sekiranya demi kepentingan melaksanakan keadilan menyeluruh satu persoalan diputuskan, dan telah diputuskan menyebelahi satu pihak, akibat daripada keputusan tersebut haruslah dilaksanakan sedemikian. Oleh itu, dalam kes ini, memandangkan persoalan undang-undang sama ada cara yang
E digunakan oleh responden untuk memohon pembatalan notis kebankrapan adalah jelas akan berpihak kepada perayu-perayu, akibat daripada keputusan tersebut haruslah dilaksanakan sedemikian. Ia bukan niat s 91(1) untuk memberikan kuasa kepada mahkamah untuk memutuskan seterusnya, dalam melaksanakan keadilan menyeluruh,
F untuk tidak mengendahkan kesilapan atau untuk mengesahkannya (lihat ms 206B–F).]

Notes

G For cases on the setting aside of bankruptcy notices, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1766–1785.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298
H (refd)

Development and Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724 (refd)

Lesco Development Corp Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184 (refd)

I *Lim Kim Guan, Re, ex p Four Seas Communications Bank Ltd Re Ng Sew Eng, ex p Four Seas Communications Bank Ltd* [1990] 1 MLJ 261 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50(1)
Bankruptcy Act 1967 ss 3(1)(i), 131, 91(1)
Bankruptcy Rules 1969 rr 18, 94(1)(b), 95(1), (2), 274, Form 7

Appeal from: Bankruptcy Nos 29–1013 of 1996 and 29–1014 of 1996 (High Court, Shah Alam)

P Royan (*T Sudharsanan* with him) (*Shook Lin & Bok*) for the appellants.
Paul Kwong (*Wong Hin Loong* with him) (*Azman Davidson & Co*) for the respondents.

Abdul Aziz JCA (delivering judgment of the court): We had before us on 15 July 2002, two appeals from the High Court in Shah Alam, brought by the appellants. United Overseas Bank (M) Bhd, who had had bankruptcy notices issued against the respective respondents. The appeals arose out of the setting aside of the bankruptcy notices by the deputy registrar on the separate applications of the respondents, which were heard together by the deputy registrar, and the subsequent dismissal of the appellants' appeals to the judge in chambers, which came up before different judges. In the High Court, the parties in one of those appeals, that is the parties in Civil Appeal No B–03–27 of 1999 before us, where the respondent was Khoo Hock Chum, had agreed to be bound by the decision in the other appeal, which resulted in Civil Appeal No B–03–22 of 1999 before us, where the respondent was Loke Lai Ying. The two appeals before us were therefore conducted on the basis that submission would only be made on Civil Appeal No B–03–22 of 1999 and that the decision in that appeal would apply to Civil Appeal No B–03–27 of 1999. The facts and considerations that follow are therefore those in or for Civil Appeal No B–03–22 of 1999.

The facts were these. On 9 January 1991, Lee Wah Bank Ltd obtained a single judgment against the respondent Loke Lai Ying (and also against Khoo Hock Chum the respondent in Civil Appeal No B–03–27 of 1999) for two sums, RM152,246.69 and RM460,496.39, with interest and costs. On 12 July 1994, by a vesting order under s 50(1) of the Banking and Financial Institutions Act 1989, the assets, rights and remedies of Lee Wah Bank Ltd vested in United Overseas Bank (M) Bhd, the appellants.

On 30 September 1995, the appellants, in Bankruptcy No 29–2618 of 1995, had a bankruptcy notice issued against the respondent demanding payment of the amount due on the judgment of 9 January 1991, which they were entitled to claim by virtue of the vesting order. The bankruptcy notice, however, was never served on the respondent because the appellants realized that the computation in the notice was not in accordance with the judgment. The notice lapsed three months later, on 30 December 1995, because according to r 96 of the Bankruptcy Rules 1969 it had to be, but was not, served within the three months. But on 15 April 1996, in Bankruptcy No 29–1013–1996, the appellants filed another bankruptcy notice claiming the sum of RM194,245.81 as being due on the judgment obtained by Lee Wah Bank Ltd on 9 January 1991. The judgment notice

A stated the fact that all assets, rights and remedies of Lee Wah Bank Ltd had vested in the appellants by virtue of the vesting order of 12 July 1994. The bankruptcy notice was served on the respondent on 11 July 1996 but a copy of the vesting order was not served with it. The respondent responded by filing an affidavit dated 18 July 1996 in which she prayed that the bankruptcy notice be set aside. The deputy registrar, by virtue of r 95(1) of
B the Bankruptcy Rules 1969 ('the Rules'), treated the affidavit as operating as an application to set aside the bankruptcy notice, heard the application, and set aside the bankruptcy notice.

The appellants' main ground of appeal in their appeal to this court, as also in their appeal to the judge in chambers, was that the respondent's
C application for the setting aside of the bankruptcy notice, made as it was through the vehicle of that affidavit, was invalid as the form and manner of it was not permitted by the rules. For an affidavit to operate by virtue of r 95(1) of the Rules as an application to set aside a bankruptcy notice, it must be an affidavit that is mentioned in r 94(1)(b) of the Rules, that is to say, an affidavit to the effect that the judgment debtor has a counterclaim,
D set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained, and the affidavit must be in Form 7 in the Appendix to the Rules, which Form bears the heading 'AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY NOTICE'. But the respondent's affidavit
E was not, in content, such an affidavit and did not bear such a heading, the heading being just 'AFFIDAVIT'. In content, it raised various grounds for setting aside the bankruptcy notice but not the ground that she had such a counterclaim, set off or cross demand. According to the Supreme Court in *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298, at p 305, challenges to a bankruptcy notice on grounds other than that the debtor has
F such a counterclaim, set off or cross demand must be made under r 18 of the Rules by filing a notice of motion — now a summons in chambers — supported by an affidavit, and not by simply filing, without an application, an affidavit, which in that case was an 'affidavit in opposition', which was consequently held to be ineffective and bad in law. Accordingly, it was submitted before us that the respondent's affidavit was bad in law and could
G not operate as an application to set aside the bankruptcy notice.

The respondent's counsel conceded that on the authorities the appellants were correct in their objection to the form and manner of the respondent's application, but he urged us to overlook the procedural error by invoking what he conceived to be the inherent powers of the court under
H s 91(1) of the Bankruptcy Act 1967 ('the Act'). Quoting only the limb relied on by counsel, the section provides as follows:

> Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide ... all ... questions whatsoever, whether of law or fact, ... which the court deems it expedient or necessary to decide for the purpose of doing complete justice ... in any [case of bankruptcy].

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Clutching at the words 'doing complete justice', counsel, submitted, as if this was a matter of exercise of discretion in the granting of an interlocutory

injunction or a stay of execution pending appeal, that the balance of convenience lay in favour of exercising the perceived discretion in the section, in that if the respondent was procedurally disqualified from challenging the bankruptcy notice, she would face dire consequences, whereas if she was not and she succeeded in setting aside the bankruptcy notice, as she did in the High Court, the appellants could always file another bankruptcy notice. To exercise the discretion in the respondent's favour would therefore, so we understood counsel to intend to say, be 'doing complete justice'. A B

Section 91(1) of the Act, as far as the limb that we have quoted is concerned, gives full power to the court to decide all questions for the purpose of doing complete justice in bankruptcy cases. The emphasis of the section is on deciding all questions, whether of fact or of law. It tells the judge that to do complete justice he has full power to decide all questions and he should exercise the power if necessary. Do not leave any question undecided, if by not deciding it complete justice will not be done. Do not leave any stone unturned in the pursuit of complete justice. But it is not the intention of the section that if the answer to a question is found to be in favour of the creditor, the debtor is yet to be saved on the perception that that would be doing complete justice. Complete justice is owed to both parties equally, not to one only. If in the interest of doing complete justice a question is decided, and decided in favour of a party, the consequence of the decision ought to be given effect to. Thus, in this case, since the question of law whether the mode adopted by the respondent to apply for the striking out of the bankruptcy notice was clearly to be decided in favour of the appellants, the consequence of the decision must be given effect to. It is not the intention of s 91(1) of the Act to give power to the court to decide further, in the name of doing complete justice, to overlook the fault or to validate it. The discretion to do that is given by s 131 of the Act and r 274 of the Rules, which counsel refrained from resorting to, probably because the Federal Court had held in *Development and Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724, at p 732, that such a defect as occurred in this case was not a formal defect or irregularity that could be cured even by resort to that section or that rule. C D E F G

As the appellants succeeded on their main ground of appeal, we allowed the appeal.

Even if the respondent had applied under r 18 for the striking out of the bankruptcy notice and the affidavit of the respondent had been one in support of the application, we would have allowed the appeal all the same, because we were of the view that the grounds on which the learned judge found that the bankruptcy notice was invalid were not sound. There were three grounds and they concerned points that were among the points that the respondent had raised in her affidavit. H

The first ground was that the appellants had not withdrawn the earlier bankruptcy notice of 30 September 1995. For that reason the judge ruled that the subsequent bankruptcy notice dated 15 April 1996 should be set aside. In so ruling, he relied on the following view of the Supreme Court in I

Lesco Development Corp Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184, at p 185:

> It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter.

That was said in the context of a situation where two actions had been simultaneously maintained to recover a debt secured by a charge of land, that is to say, a foreclosure action and an action for debt. The situation in the present case was of a completely different character. Furthermore, there was no question in this case of two different courts trying and determining the same issues between the same parties relating to the same subject matter. Since the first bankruptcy notice had lapsed, there was no question of the case in which it had been filed proceeding further, even if the bankruptcy notice was not formally withdrawn. Since the first notice had not been served and had lapsed, the appellants were perfectly entitled to issue the subsequent notice.

The second ground was the appellants' failure to serve on the respondent a copy of the vesting order together with the bankruptcy notice. This was what the judge said at p 11 of his grounds of judgment:

> I am of the opinion that the bankruptcy notice was misleading, embarrassing or perplexing. Without making further enquiries, the Respondent could not be certain that he would be making payment to the correct party. In light of this, the Respondent had not failed to comply with the bankruptcy notice.

As stated earlier, the bankruptcy notice did state the fact that all assets, rights and remedies of Lee Wah Bank Ltd had vested in the appellants by the vesting order of 12 July 1994. The bankruptcy notice also stated the fact that the amount claimed was the amount due on the final judgment which Lee Wah Bank Ltd had obtained against the respondent.

In opining that in the absence of a copy of the vesting order the bankruptcy notice was misleading, embarrassing or perplexing, the learned judge was inspired by a passage in the judgment of Thean J in the Singapore case of *Re Lim Kim Guan, ex p Four Seas Communications Bank Ltd Re Ng Sew Eng, ex p Four Seas Communications Bank Ltd* [1990] 1 MLJ 261, at p 265:

> All these cases show how strictly the courts have construed and treated a bankruptcy notice because of the serious consequences — the courts have called them 'penal consequences' or 'quasi-penal consequences' — which ensue upon a debtor's non-compliance with the notice. A bankruptcy notice must not be calculated to mislead, embarrass or perplex the debtor. In this connection, the test is not whether the debtor has been misled, embarrassed or perplexed by the bankruptcy notice, but whether he could be so misled, embarrassed or perplexed.

The cases referred to in the passage which led Thean J to arrive at the conclusion set out in the passage were cases on whether the bankruptcy notice in question required the debtor to pay the judgment debt 'in accordance with the terms of the judgment or order', a requirement that is

also to be found in s 3(1)(i) of our Bankruptcy Act 1967, where the court found that the particular respect in which the requirement to pay was not in accordance with the judgment was likely to mislead, embarrass or perplex the debtor. The requirement in the judgment notice in this case that the respondent make payment to the appellants was of course not in accordance with the judgment but it was in law an inevitable requirement in view of the vesting order. The reason for the requirement having been manifested in the notice itself, we were unable to see how the respondent could or might have been misled, embarrassed or perplexed by the requirement. The position was so clearly set out in the bankruptcy notice that the requirement could not have misled, embarrassed or perplexed her and we were unable to agree with the learned judge that the respondent could have been misled, embarrassed or perplexed just because she did not have sight of the vesting order.

The third ground was a trivial one that nevertheless requires some effort in setting out the circumstances. The bankruptcy notice had appended to it particulars showing how the sum of RM194,245.81 that was demanded had been arrived at. As earlier stated, the judgment was for two sums, RM152,246.69 and RM460.496.39, with interest and costs. The particulars were in two parts. Part A being for the first sum, which was under a fixed loan, and Part B being for the second sum, which was under an overdraft. Each part began by stating the judgment sum and then proceeded to add interest raised on it and on the resultant sum from time to time and to subtract payments made from time to time, and ended with the resultant amount owing as at 15 April 1996, the date of the bankruptcy notice. The amount for Part A was RM149,274.46 and that for Part B was RM44,971.35. The two amounts totalled RM194,245.81, the amount demanded by the bankruptcy notice.

At the beginning of Part B, however, the setting out of the judgment sum and of the first raising of interest appeared as follows:

1	Judgment sum		RM460,496.36
2	Add: Overdue Interest at 12% per annum on RM460,496.39 from 1 January 1991 to 31 January 1991	RM	4,693.27
			RM465,189.66

It can be seen that although the judgment sum was incorrectly stated to be RM460,496.36, which was 3 sen less than the correct amount, the correct amount was used in calculating the first interest, and the total of RM465,189.66 was arrived at as if the judgment sum, although incorrectly stated, had included 3 sen more. It was clear to me, therefore, that the sum of RM460,496.36 was a misprint which did not affect the calculation. Yet the learned judge, at p 13 of his grounds of judgment, said this:

> Therefore in the instant case there was a discrepancy in the Bankruptcy Notice which indicated that the wrong amount had been claimed. Accordingly, the bankruptcy notice was therefore invalid.

A We need say nothing more about it.

As the respondent's affidavit had been treated by virtue of r 95(1) of the Rules as an application to set aside the bankruptcy notice, and as, therefore, by virtue of r 95(2) of the Rules no act of bankruptcy had been committed by the respondent by her failure to satisfy the bankruptcy notice, in allowing
B the appellants' appeal we allowed the respondent seven days to satisfy the bankruptcy notice to avoid committing an act of bankruptcy. In view of the basis on which the two appeals were conducted, as explained earlier, our decision applied also to the other appeal.

Appeal allowed.

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Reported by Peter Ling

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